



Comptroller General
of the United States

Washington, D.C. 20548

147929

Decision

Matter of: S.W. Electronics & Manufacturing Corp.

File: B-249308

Date: November 3, 1992

Vincent O. Manuele, Esq., Starfield & Payne, for the protester.
Lola Dickerman, Esq., for Connector Technology Corporation, an interested party.
Charles J. McManus, Esq., Jonathan H. Kosarin, Esq., and Gary P. Van Osten, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq. and John Brosnan, Esq., Office of the General Counsel, GAO. participated in the preparation of the decision.

DIGEST

Offeror bears responsibility for conveying its offer, including modification, to the designated government office on time; where modification was allegedly transmitted by telefacsimile, but agency denies receipt and there is no proof of receipt, offeror bears risk of nonreceipt.

DECISION

S.W. Electronics & Manufacturing Corp. (SWEMCO) protests the award of a contract to Connector Technology Corporation under request for proposals (RFP) No. N00104-92-R-G079 issued by the Navy Ships Parts Control Center for 38 cable assemblies. SWEMCO argues that it telefaxed a proposal modification to the Control Center before the amended closing date for receipt of proposals and that but for agency mishandling that resulted in the agency's failure to receive the telefax, SWEMCO would have been the low offeror.

We deny the protest.

The solicitation, issued on March 10, 1992, provided that award would be made to the low priced, technically acceptable offeror and contained the clause set forth at Federal Acquisition Regulation (FAR) § 52.215-18, entitled "Facsimile Proposals (Dec 1989)," which states that offerors may submit facsimile proposals, proposal modifications or proposal withdrawals. The clause provided the telephone number of the Control Center bidroom facsimile machine and

cautioned that facsimile responses "must arrive at the place, and by the date, specified in the solicitation." The clause specifically stated that, if the offeror chooses to transmit a facsimile proposal, the agency "will not be responsible for any failure attributable to the transmission or receipt of the facsimile proposal. . . ."

Eight initial proposals were received by the April 9 closing time. The agency issued an amendment to clarify an RFP inconsistency and requested revised offers by May 12. In response, one firm withdrew its offer; three others acknowledged the amendment and one of the three revised its price. No acknowledgement of the amendment or revised offer was received from SWEMCO.

On June 26, the Navy awarded a contract to Connector Technology as the firm had submitted the low priced, technically acceptable offer. SWEMCO filed this protest with our Office on July 6.

SWEMCO asserts that on May 8, 4 days before the closing date for receipt of revised offers, it submitted its revised proposal by facsimile to the Control Center at the number provided in the solicitation. According to the protester, the proposal revision contained a price reduction which caused it to become the low offeror. SWEMCO supports this assertion with a copy of its billing statement from Cable & Wireless Communications, Inc., its telecopier servicer, to show that SWEMCO's telecopier phone line was in communication with the Control Center telefax machine at 11:38 a.m. on May 8 for 2 minutes. SWEMCO argues that the agency must therefore have received but misplaced its telefaxed modification. SWEMCO states that the agency's failure to maintain a log of incoming facsimile transmissions is evidence of the agency's failure to properly handle SWEMCO's revised proposal.


As noted above, the agency denies that it received the revised proposal and maintains that it has adequate procedures for handling facsimile transmissions and that these standard procedures were followed on the day SWEMCO alleges it telefaxed its proposal modification. Specifically, the agency states that it "maintains a single facsimile machine in its bidroom solely for the purpose of receiving offers, bids and other requested responses to solicitations." According to the agency, while it does not maintain a log of incoming transmissions, the facsimile machine is "cleared" of incoming transmissions at least five times--at 8 a.m., 9:30 a.m., 11 a.m., 1 p.m., and 4 p.m.--during the normal daily operating hours. At each collection, the agency bidroom attendant collects, segregates by solicitation number, time/date stamps, and places in separate envelopes, the transmissions. The

envelopes are marked with the solicitation number and, if the workload permits, each envelope is filed with the appropriate solicitation file maintained in the bidroom. The agency states that it has, subsequent to the filing of this protest, "conducted a good-faith search for SWEMCO's purported revised offer" but no revised proposal has been found. The agency argues that SWEMCO failed in its obligation to insure that the Control Center received its alleged revised offer.

The regulations place the burden on offerors to see that offers and any modifications to them reach the designated government office on time. FAR § 15.412(b); Southern CAD/CAM, 71 Comp. Gen. 78 (1991), 91-2 CPD ¶ 453; Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514. In particular, contractors using facsimile transmission to file documents assume the risk of nonreceipt. Southern CAD/CAM, supra.

Even if the Control Center's procedures are less than ideal because of its failure to maintain a log for incoming transmissions, there is no evidence that SWEMCO's revised offer was received by the agency. SWEMCO's telephone bill, by itself, does not establish an actual transmission occurred or what was transmitted. It only shows that a connection was made with the Control Center's facsimile number. There is no way to tell whether SWEMCO's proposal modification or blank pages or, in fact, whether anything at all was transmitted. SWEMCO has not established that its proposal modification was received by the Control Center since evidence of a facsimile transmission does not establish receipt where, as here, contracting officials deny receipt and there is no evidence that they are in error. See Southern CAD/CAM, supra; R&J Mfg. Co., B-235305, Aug. 18, 1989, 89-2 CPD ¶ 150. Without evidence that SWEMCO's facsimile was successfully transmitted and received, there is no basis for concluding that the agency timely received a proposal modification from SWEMCO.

The protest is denied.


for James F. Hinchman
General Counsel